

Neutral Citation No: [2025] NIMaster 17

Ref: [2025]NIMaster 17

ICOS No:

Judgment: approved by the court for handing down (subject to editorial corrections)

Delivered: 23/10/2025

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Theresa Fitzsimmons as plaintiff and personal representative of the estate and dependents of John George (Deceased)

Plaintiff

and

Chief Constable of the Police Service of Northern Ireland

Defendant

Mr Bassett (instructed by O'Muirigh, Solicitors) for the Plaintiff

Mr M. McEvoy (instructed by The Crown Solicitor's Office) for the Defendants

Master Bell

Introduction

[1] This application is concerned with the issue of how a statement of claim must be drafted when the tort of misfeasance in public office is pleaded. The defendant argues that, after four attempts at the pleading and a judicial warning, the plaintiff has still not managed to plead her case in such a way as to comply with the Rules of the Court of the Judicature and the relevant case law and that her amended, amended, amended statement of claim (hereafter simply "statement of claim") should therefore be struck out. The plaintiff contests the application, submitting that her pleading is entirely adequate and that the action should proceed to trial.

[2] The context of the application is as follows. On 13 April 1984 John George was murdered at his home in Belfast by members of the INLA. The plaintiff alleges that the police knew of a risk to Mr George's life and made a bad faith decision not to warn him of the threat. This failure amounted therefore to the tort of misfeasance in public office. In addition, she alleges that the police failed to obtain and retain all relevant forensic evidence and follow up on obvious intelligence-led opportunities to investigate his murder. This too, she alleges, constitutes the tort of misfeasance in public office.

[3] The defendant's summons is an application under Order 18 Rule 19(1) to strike out multiple paragraphs of the plaintiff's statement of claim but also includes the seeking of such further order as is deemed appropriate.

[4] The application is grounded by an affidavit from Mr Hogg of the Crown Solicitor's Office which has been replied to by an affidavit from Mr Bunting of O'Muirigh Solicitors. Exhibited to Mr Bunting's affidavit is the Historical Enquiries Team (hereafter "HET") report into Mr George's murder and the subsequent criminal investigation.

[5] It is important to note that this is an action where the discovery process has already been completed. The plaintiff has received all police information and documentation to which she is entitled to under the Rules of the Court of Judicature. Some documentation has been withheld from her on the basis of Public Interest Immunity. However there has been a PII hearing in regard to that documentation and a High Court judge has considered each document and concluded that it contains nothing which would assist the plaintiff's case. This is not therefore a situation where the plaintiff makes a submission that she cannot draft an adequate statement of claim prior to receiving discovery. Rather, she has received all the documentation that a court considered might be of benefit to her.

Defendant's Submissions

[6] Mr McEvoy initially submitted that his application was "to bring some clarity and refinement" to the plaintiff's statement of claim. He observed that the defendant had made "extensive efforts" to get the plaintiff to focus her mind on the pleadings and that the defendant had been joined in that effort by Rooney J at the last review of the action when the judge made a number of observations about the state of the plaintiff's pleading. When asked about the relief being sought, however, Mr McEvoy confirmed that this was not an application for further and better particulars, that is to say for more clarity and refinement, or merely for discrete sections of the statement of claim to be struck out, and conceded that he was, in fact, seeking by this application to bring the plaintiff's action to an end.

[7] Mr McEvoy referred the court to the decision of the Court of Appeal in *Magill v Chief Constable* [2022] NICA 49 as the leading authority on the principles to be applied in strike out applications.

[8] The primary focus of the defendant's submissions was on the issue of the inadequacy of the plaintiff's pleadings and the paucity of material facts in that pleading. Counsel referred me to *Askin and others v Chief Constable of the Police Service of Northern Ireland* [2024] NIMaster 7 where Master Harvey held:

"It is insufficient to make bare assertions, rather it is necessary to plead the facts which it is intended to prove to support the claim, with sufficient particularity."

and

"Since only material facts may be included, Order 18 Rule 7 also precludes the inclusion of statements of belief. Beliefs do not constitute facts which a plaintiff proposes to prove. The minimum requirements in each case will inevitably depend upon the context, nature of the claim and the complexity of the facts upon which it is founded, however the pleading must contain "the necessary particulars of any claim." The court has power to order particulars of the claim (Order 18, Rule 12(3)) on such terms as it thinks just. This would be futile in this case given the plaintiffs all but concede the current statement of claim and replies to particulars are the best they can muster."

[9] The defendant also referred me to paragraphs 31 to 36 of my decision in *Doherty v Chief Constable* [2025] NIMaster 13 which set out a number of the principles to be applied in respect of pleading material facts.

[10] The defendant drew my attention to various paragraphs of the statement of claim which, it was submitted, consisted entirely of statements of belief, opinions, rhetoric and bare assertions rather than facts. As such, it was submitted, the plaintiff's pleading was likely to prejudice, embarrass or delay the fair trial of the action and abuse the process of the court.

[11] Mr McEvoy argued that paragraphs 5, 7 and 8 were simply the opinions and beliefs of the plaintiff and amounted to criticism of the police handling of the investigation of her husband's murder which took place over 40 years ago. Paragraph 7 speaks of "*areas of concern* in relation to the circumstances of the murder and the subsequent flawed investigation." They were submissions, counsel submitted, which would belong, if anywhere, in representations to a public inquiry and they had no place in inter partes civil litigation, particularly in circumstances where the plaintiff was now in possession of all discoverable material. As such, they were an abuse of the process of civil litigation.

[12] Mr McEvoy also argued that paragraphs 9, 10 and 11 were generalized statements of perception which belonged, if anywhere, in the sphere of journalistic opinion in the print or broadcast media rather than in the carefully regulated envelope of legal pleadings. It would be impossible for the defendant to have to set about the task of responding to the broad and sweeping assertions contained in them. In addition, these wide and sweeping assertions of opinion were such that

they rendered the possibility of seeking further particulars impracticable. Hence, they also were an abuse of the process of civil litigation.

[13] It was submitted by the defendant that the drafting of the statement of claim was another example of a “Micawber approach to litigation” which had been depreciated not only in *Doherty v Chief Constable* but also in *Carey v Chief Constable* [2025] NIMaster 14. However, unlike those cases, the plaintiff in this action persevered in the hope that “something will turn up” even though here, discovery was already complete.

[14] Mr McEvoy also submitted that nine particular sub-paragraphs contained in paragraphs 24 and 30 of the statement of claim were “essentially repurposed negligence allegations” which had no place in a claim solely for misfeasance in public office, now that the plaintiff had amended her statement of claim and withdrawn her claims for negligence, breach of statutory duty and breach of Article 2 ECHR.

[15] A further defect in the pleadings suggested by Mr McEvoy was that paragraphs 5, 7, 8, 9, 10, and 11 were, at their height, assertions of evidence and not of fact. This, he submitted, offended the requirement in Order 18 Rule 7(1) whereby:

“every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case permits.”

[16] Mr McEvoy also observed that the plaintiff had been aware of the need to rectify the defect in the pleadings and she had, during a review of the action, received a warning from Rooney J as to the inadequacy of her statement of claim. Mr Hogg’s grounding affidavit had exhibited to it what he described as a contemporaneous note of Rooney J’s observations. Yet the latest version of the plaintiff’s statement of claim still manifested the same fundamental flaws. (While the traditional language of our legal culture is to state that “the plaintiff’s” statement of claim is inadequate, the criticism is, of course, directed against the work of her legal team and not against her as an individual).

[17] Importantly, because discovery had now been completed, the plaintiff’s statement of claim was, in the words of counsel: “As good as it is going to get.” There was no hope of something turning up and no new evidence of bad faith was going to be produced.

Plaintiff’s Submissions

[18] Mr Bassett submitted that the plaintiff’s case alleges dishonest misuse of public law powers by police officers acting with knowledge or reckless indifference to the illegality of their actions. He argued that the case to be presented at trial followed the contours of *Three Rivers DC v Governor and Company of the Bank of*

England [2000] UKHL 33. In particular he referred me to the speech of Lord Steyn in *Three Rivers*. Lord Steyn identified that the ingredients of the tort were that:

- (i) The defendant must be a public officer;
- (ii) The defendant must be exercising the powers of a public officer;
- (iii) The state of mind of the defendant must be either that there was targeted malice (ie conduct specifically intended to injure a person) or untargeted malice (ie where the defendant acts, knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff).
- (iv) The plaintiff must have a legal standing to sue.
- (v) There must be damage, loss or injury as a result.

[19] Counsel submitted that a failure to warn Mr George of the danger to his life constituted misfeasance. The material facts on which the plaintiff relied were that the police had received intelligence of an imminent threat to Mr George between November 1983 and March 1984 and had, in bad faith, failed to act upon it. The plaintiff submitted that there was an “irresistible inference that the police, in bad faith, elected to protect an intelligence source” rather than warn Mr George.

[20] The plaintiff placed significant weight on RUC Force Order 12/84. This directive by the Chief Constable, entitled “Threats Against the Lives of Members of the Security Forces, VIPs and Other Individuals”, stated in paragraph 3.1:

“If the information received indicates that an attack on any person is imminent, the member receiving the information will immediately take all necessary action to inform the person at risk and then comply with paragraph 2 ante.”

Paragraph 2 contains the following provision in respect of the category of “Other persons”:

“Local SB concerned will inform the sub-divisional commander in whose area the subject resides/works and the SDC will take whatever action he considers necessary. The local SB will inform SB HQ (E3). The latter will pass the details to FCIC and D1 Security.”

[21] Mr Bassett submitted that the plaintiff received the HET report in November 2014 which revealed to her, for the first time, conscious police inaction prior to Mr George’s murder which contravened the applicable Force Order.

[22] In respect of the law on applications to strike out, Mr Bassett referred me to a number of decisions. In addition to *Magill v Chief Constable*, he also referred me to what has been said on this issue in *Governor and Company of the Bank of Ireland v Conway* [2024] NICA 30 and *Rush v Chief Constable* [2011] NIQB 28. He submitted that the statement of claim did not reach the threshold of being inarguable or incontestably bad.

[23] Counsel observed that the purpose of particulars in pleadings is to ensure the parties know each other's case and can fairly counter it at trial; allow for proper preparation for trial and limit the volume and character of evidence to those matters relevant to the determination of the claims; and, in effect, audit of a claim by representatives (*King v. Steifel* (2021) EWHC 1045 (Comm)).

[24] The Plaintiff referred me to the comments regarding pleadings offered by the Jersey Court of Appeal in the case of *In Esteem Settlement* 2001/50 and endorsed by Master of the Royal Court in Jersey in *Crociani -v- Crociani* [2015] JRC 227 at paragraph 14 :

“(4) Consistently with that objective, the correct function of pleadings needs to be kept in mind. The function of pleadings is to set out the material facts on which the parties will rely at trial to establish their causes of action or defences, and which the parties will seek at trial to establish by relevant and admissible evidence. It is no part of the function of advocates to seek to persuade the Royal Court to strike out the whole or part of a pleading which contains plainly arguable causes of action, or to edit a pleading whether so as to improve it or to make it less effective. It is no part of the function of the Royal Court to lend itself to any such endeavours on the part of advocates. Formal pleading is an art, not a science, and to seek to achieve some abstract level of perfection in pleadings is not consistent with the objective I have stated, or of value in terms of time, effort or expense.”

[25] Counsel submitted that the remarks of Rooney J at the review hearing referred to by Mr McEvoy were inadmissible in the application now before the court.

[26] Mr Bassett submitted that the version of the plaintiff's statement of claim which had been served on 12 March 2025 set out material facts which could be readily understood and then either disputed or accepted by the defendant.

Discussion

The Law on Striking Out

[27] The plaintiff and the defendant agree as to the law in respect of the power of the court to strike out pleadings.

[28] In the decision of the court in *Magill v Chief Constable*, [2022] NICA 49, McCloskey LJ summarised the principles to be applied in strike out applications:

“[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 12 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this

exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:

- (i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
- (ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.
- (iii) In approaching such applications, the court should be cautious in any developing field of law; thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

"In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim'.

- (iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.
- (v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.
- (vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out." Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated:

“This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that no matter what (within the bounds of the pleading) the actual facts of the claim it is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached.”

We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim *in limine*.”

[29] I also bear in mind that as long as a statement of claim discloses some cause of action, or raises some question fit to be decided at trial, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (*Moore v Lawson* (1915) 31 TLR 418 CA).

[30] These are the principles which the court must therefore apply in deciding whether or not to strike out the plaintiff’s statement of claim.

Pleadings and Material Facts

[31] Master Harvey’s observations on the subject of pleadings in *Askin and others v Chief Constable of the Police Service of Northern Ireland and others* are not an isolated example of when litigants and their counsel have had to be reminded of these fundamental points on the subject of pleading. Although it may seem surprising that they need to be addressed, this is a common judicial experience. In a notable example, prior to the 1999 civil procedure reforms in England and Wales, Lord Woolf felt it necessary to say in “Access to Justice: Interim Report” (London: HMSO, 1995):

“... essentially, the problem is that the basic function of pleadings – to state succinctly the facts relied on – has been lost sight of. The primacy of this requirement needs to be clearly restated.”

[32] As Phipson on Evidence expresses it in paragraph 2-02 of the 20th edition, any claim form (ie any statement of claim) which fails to provide a concise statement of facts relied upon is likely to be struck out. Similarly, Bullen & Leake & Jacobs in paragraph 1-18 of their “Precedents and Pleadings” (19th edition) concisely express the principle involved and the likely consequence of failure to comply:

“The statement of case must state facts which, if correct, give rise to a valid legal claim or defence. If it does not do so, it is liable to be struck out.”

[33] The law reports are replete with explanations as to how pleadings must be drafted. Material facts are all those facts necessary for the purpose of formulating a complete cause of action: *Bruce v Odhams Press Ltd* [1936] 1 K.B.697 at p.712; It is not sufficient that a statement of claim simply express a conclusion drawn from facts which are not stated: *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 F.C.R. 109 at p.114. Not only must all material facts be pleaded, but they must be pleaded with a sufficient degree of specificity, having regard to the general subject-matter, to convey to the opposite party the case that party has to meet: *Ratcliffe v. Evans* [1892] 2 Q.B. 524 at p.532. The absence of material facts is a fundamental stumbling block in litigation. In their decision in *Michael O'Higgins v Barclays Bank plc* [2022] CAT 16 Marcus Smith J and Anthony Neuberger commented,

“Bare or unparticularised assertion is not enough: a pleading must set out (but does not have to prove) all the material facts on which a party relies for his or her claim or defence.”

Likewise, Popplewell LJ explained in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] that a pleading must be supported by evidence which establishes a factual basis for an allegation. It is not sufficient simply to plead allegations which, if true, would establish a claim. There must be evidential material which establishes a sufficiently arguable case which undergirds it.

[34] In *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) Leggatt J explained:

“Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial.”

[35] The approach in *Tchenguiz* has been approved in many subsequent authorities, including by Stuart-Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) where, under the heading “The proper function of pleadings”, he stated (the emphasis being in the original):

“30. It should not need repeating that Particulars of Claim *must* include a *concise* statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The “facts on which the Claimant relies” should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim ... The Queen’s Bench Guide provides guidelines which should be followed: they reflect good and proper practice that has been universally known by competent practitioners for decades. They include that “a statement of case must be as brief and

concise as possible and confined to setting out the bald facts and not the evidence of them”: see 6.7.4(1). A statement of case exceeding 25 pages is regarded as exceptional: experience shows that most cases can be accommodated in well under 25 pages even where the most serious allegations are made. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide.

31. Where statements of case do not comply with these basic principles, the Court may require the Claimant to achieve compliance by striking out the offending document and requiring service of a compliant one: see *Tchenguiz v Grant Thornton* [2015] EWHC 405 (Comm) and *Brown v AB* [2018] EWHC 623 (QB). It has always been within the power of the Court to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious.”

[36] The concept of material facts is described in *The Supreme Court Practice* (1999 edition), at paragraph 18/7/11:

“It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (per Cotton LJ in *Philipps v Philipps* (1878) 4 QBD 127, p 139). “Material” means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 All ER 287 at 294). Each party must plead all the material facts on which he means to rely on at trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (*West Rand Co v R* [1905] 2 KB 399; see *Ayers v Hanson* [1912] WN 193).”

[37] A court must, of course, bear in mind that not all facts are proved directly. Some facts are proved by inference. In *Thorn Security Ltd v Siemens Schwartz AG* [2008] EWCA Civ 1161 Mummery LJ described what an inference is:

“The drawing of inferences is, of course, a familiar technique in judicial decision making. It enables a judge to conclude that, on the basis of proven facts A and B, a third fact, C, was more probable than not.

[38] However counsel sometimes confuse the concept of “inference” with mere speculation and suspicion. In *Jones v Great Western Railway Company* (1930) 144 LT194 at p 202, Lord Macmillan observed that:

“The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.”

Collins Rice J explained in *Sivananthan v Vasikaran* [2023] EMLR 7 at [53]:

“There is a difference between inference and speculation. The components of an inferential case must themselves be sufficiently evidenced and/or inherently probable to be capable of adding up to something which discharges a claimant's burden”.

[39] The proper pleading of facts is a fundamental aspect of litigation practice. In *NEC Semi-Conductors Ltd v IRC* [2006] STC 606 Mummery LJ made the following observations:

“While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason – so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action.”

[40] These authorities from England and Wales on the subject of pleading also represent the position which applies in this jurisdiction. The importance of pleading material facts to undergird assertions in a statement of claim was referred to in *Re Rooney's Application* [1995] NI 398 where Hutton LCJ referred to the judgment of Sir Thomas Bingham MR in *R v Secretary of State for Health, ex p Hackney London Borough* [1994] CA Transcript 1037. In his judgment the Master of the Rolls had stated:

“In the ordinary inter-partes civil action the plaintiff usually makes a series of factual averments which may well be challenged, but which are usually sufficiently plausible to raise issues calling for discovery. It is not open to a plaintiff in a civil action, or to an applicant for judicial

review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as “fishing”: the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect.”

The Lord Chief Justice, with whom Carswell LJ and Nicholson LJ both agreed, concurred with the view of the Master of the Rolls and adopted the position that the pleadings in civil actions should contain a series of factual averments alleging acts or omissions by the defendant.

[41] The principles governing pleadings are applied across the full range of civil litigation in Northern Ireland and England and Wales. There are no categories of civil litigation to which these principles do not apply. Hence the principles outlined above apply to clinical negligence cases, commercial litigation and legacy cases.

Drafting Statements of Claim for Misfeasance

[42] Consideration of the statement of claim in this case must begin with some remarks on its organisation and structure. This was a claim where there were, in reality, allegations that the tort of misfeasance had been committed on two occasions by police officers and, in my view, each instance ought to have been pleaded separately. This is not simply a matter of preferred style but rather one of pleadings being drafted to enable the court to reach a conclusion on the issues. The first allegation by the plaintiff was that there had been a failure by police to pass on to Mr George information that his life was in danger and, as a result, he was not able to take action to safeguard himself and so ultimately was murdered. There was then a second allegation that, at some point in time after Mr George had been murdered, there had been a failure by police to investigate his murder properly and that this too amounted to a misfeasance in public office. The statement of claim presented these two claims (which I shall refer to in this judgment as “MIPO 1” and “MIPO 2”) as one, somewhat confused, rolled-up claim. The obvious difficulty with rolling-up these two allegations into one, and not distinguishing them from each other, is that they almost certainly involve allegations against a minimum of two different individuals, or, more likely, two groups of officers. In relation to MIPO 1, the bad faith of Special Branch officers or sub-divisional uniformed officers would likely be at issue. In respect of MIPO 2 the bad faith of CID officers would likely be at issue. The state of mind of one group cannot be assumed to be attributable to another, entirely different, group of officers. For example, one group may have acted with bad faith and the other group may have simply done what they did out of incompetence. Additionally, the loss, damage or injury of each misfeasance will almost certainly be different. Furthermore, the two alleged misfeasances will have occurred on different

dates and may need to be considered separately with respect to limitation. This is a basic pleading issue: separate causes of action need to be pleaded separately.

[43] This structural and organisational problem is mentioned for two reasons. Firstly, it has made the analysis of the current statement of claim more difficult; and secondly, so as to give guidance to counsel who may be drafting future claims of misfeasance. Counsel are therefore encouraged, when drafting such allegations, to consider whether they should be pleading that one instance or multiple instances of misfeasance have occurred. Clearly, if the allegation of misfeasance involves one individual person whose bad faith is at issue, then there may need only be one set of particulars of misfeasance outlined in the statement of claim. In other instances, such as where misfeasance is alleged against different groups of people, the particulars of misfeasance will often need to be divided into separate causes of action. This approach to drafting has been adopted in Australia. In *Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198, the Federal Court of Australia dealt with a misfeasance claim which included four allegations of misfeasance, described for convenience in the pleadings as MIPO 1, MIPO 2, MIPO 3 and MIPO 4. This approach to pleading allows a judge to reach clear and precise conclusions on the facts at trial.

The Tort of Misfeasance in Public Office

[44] The leading authority on the subject of misfeasance in public office is *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)*. The ingredients of the tort were subsequently and usefully summarised by Tugendhat J in *Carter and others v Chief Constable of the Cumbria Police* [2008] EWHC 1072 (QB) as follows:

“(a) The defendant must be a public officer;

(b) The conduct complained of, that is an act and/or an omission (in the sense of a decision not to act) must be in the exercise of public functions;

(c) Malice: The defendant's state of mind must be one of two types, namely either:

- i) “Targeted malice” i.e. the conduct is “specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of a public power for an improper or ulterior motive...”.
- ii) “Untargeted malice”: i.e. the public officer acts knowing that he has no power to do the act complained of or with reckless indifference as to the lack of such power and that the act will probably injure the claimant. “... it involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful...” Thus the unifying

element is “.... conduct amounting to an abuse of power accompanied by subjective bad faith...”

(d) The claimant must have a "sufficient interest to found a legal standing to sue" but there is no requirement of sufficient proximity between the claimant and the defendant;

(e) Causation of damages/loss;

(f) Remoteness of damage: Where the malice is of the second type, see (c)(ii) above – The defendant must know that his/her conduct “would probably injure the plaintiff or person of a class of which the plaintiff was a member.” “

[45] If, therefore, one was attempting to define the essence of misfeasance in public office, one might usefully explain it as a dishonest abuse of public power exercised in a deliberate or reckless manner. As Lord Steyn observed in *Three Rivers*, the test to be applied by the courts represents a satisfactory balance between two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions. Misfeasance imposes liability for “an abuse of power accompanied by subjective bad faith” (*per* Lord Steyn in *Three Rivers*).

[47] In *Three Rivers*, Lord Millett explained that the rules which governed both pleading and proving a case of fraud were very strict. He observed that it was important to appreciate that there were two principles in play. The first was a matter of pleading. The function of pleadings was to give the party opposite sufficient notice of the case which is being made against him. Lord Millett then stated (at paragraph [186]):

“The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.”

[48] Also in *Three Rivers*, Lord Hope stated (at paragraph [46]):

“The effect of your Lordships' decision following the first hearing is that it is sufficient for the purposes of this limb of the tort to demonstrate a state of mind which amounts to subjective recklessness. That state of mind is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which he knew to be unlawful but chose deliberately to disregard that risk.”

This quotation from Lord Hope's speech emphasises that what the plaintiff must prove in order to be successful with an allegation of misfeasance are facts in relation to an individual's *state of mind*.

[49] In 2019 the Law Commission for England and Wales conducted a project on the subject of “Reforming Misconduct in Public Office”. Although the Law Commission's focus was on criminal law offences, one of its background papers considered the related tort of misfeasance in public office. Appendix B to the Commission's background paper stated:

“Pleading bad faith is difficult, because the pleading rules require details, and professional conduct rules forbid practitioners supporting obviously baseless allegations. Proving bad faith is even more difficult. Where they have a choice, the courts are strongly disposed to believing that bureaucratic error was caused by genuine mistake, even incompetence, rather than by bad faith. The result is that of the hundreds of misfeasance claims that are actually filed, very few make it to trial. Most are filtered out for inadequate pleading of bad faith, or because an allegation of bad faith has no real prospect of success. ... Misfeasance in public office is an oddity in several respects. Not allowed to trespass on better established torts, it occupies a tiny niche reserved, in essence, for redressing harms caused by public officers who knew or suspected that they were abusing their public power or position to the detriment of the individual.”

[50] There are numerous examples of claims of misfeasance in public office being struck out for lack of proper pleading of bad faith. Two examples from this year alone will suffice. In *Van Buuren v The Chief Constable of Cambridgeshire Constabulary and Others* [2025] EWHC 195 (KB) Sweeting J said:

“Vague or general assertions of bad faith, without sufficient factual backing, will be vulnerable to being struck out by the court.”

Sweeting J went on to observe:

“The Particulars of Claim lack necessary specificity, particularly with regard to the powers exercised, the individuals involved, the dates of the alleged misconduct, the evidence of bad faith, and the factual basis for each element of the tort.”

Similarly, in *Tuyunuklu v The Commissioner of Police for the Metropolis* [2025] EWHC 1925 (KB) Master Fontaine said:

“The Claimant has not pleaded and properly particularised the bad faith or reckless indifference relied upon, and that which is pleaded is consistent with mistake or negligence and accordingly liable to be struck out.”

[51] It is important to mention again that when it comes to proving bad faith, this can, of course, be done by inference. In *Young v The Chief Constable of the Warwickshire Police and The Director of Public Prosecutions* [2020] EWHC 308 (QB) Master Davison discussed inadequate pleading and the particularising of bad faith in misfeasance actions:

“[26] In line with the heavy burden thus imposed, the claimant must specifically plead and properly particularise the bad faith or reckless indifference relied upon. It may be possible to infer malice. But if what is pleaded as giving rise to an inference is equally consistent with mistake or negligence, then such a pleading will be insufficient and will be liable to be struck out. The claimant must also specifically plead and properly particularise both the damage and why the public officer must have foreseen it. A pleading that fails to do so is similarly liable to be struck out. These propositions have been established in a series of cases, including *Three Rivers*, *Thacker v Crown Prosecution Service* CA, 16 December 1997 (unreported) and *Carter v Chief Constable of Cumbria* [2008] EWHC 1072 (QB).”

[52] The difficulty of proving bad faith inferentially was highlighted in *Young* where both defendants submitted that the claimant had not pleaded a claim for misfeasance with sufficient particularity. In essence, it was submitted that what the claimant complained about was as (or more) consistent with mistake or negligence than with malice. Further, the claimant had not pleaded a case of knowledge on the part of the defendants as to the consequences for the claimant of their acts and omissions. Master Davison stated:

“I should scrutinise the claim carefully to ensure that the allegations of misfeasance in public office amount or are capable of amounting, in reality, to something more than "mere" negligence. They do not. And I should make it clear that a pleading that does not or cannot give proper particulars of bad faith is not saved by the “bootstraps” operation of alleging that this is the “only explanation” when, on the facts pleaded, that is quite clearly not the case.”

On appeal, Master Davison’s exposition of the legal position on misfeasance in public office, and the application of those principles in his decision to strike out the allegations, was upheld by Martin Spencer J in the latter’s decision at [2021] EWHC 3453 (QB).

[53] The issue of what is required to plead malice is also considered in actions for malicious prosecution where it is similarly a crucial element of the tort. In *Daly v Independent Office For Police Conduct* [2023] EWHC 2236 (KB) the claimant was a serving police officer who was the subject of both criminal and disciplinary proceedings. The police officer was acquitted in the criminal proceedings. The disciplinary proceedings against him went ahead but were dismissed without his having to give evidence. The police officer then instituted proceedings for malicious prosecution and misfeasance against the Independent Office for Police Conduct in relation to both the criminal proceedings and the disciplinary proceedings taken against him. The particulars of malicious prosecution set out in the pleadings included failures in the conduct of the investigation, a failure to hold a formal identification procedure, a failure to act in a fair and impartial manner, and a failure to appoint a sufficiently experienced investigative officer. Upon considering the pleadings, Master Yoxall struck out the claim, stating:

“In my judgment these alleged failures and the matters pleaded under the various sub-headings, even if proved, do not establish malice. These failures, if made out, may equally show incompetence or want of care. That is no basis for a claim in malicious prosecution.”

In his pleading as regards the alleged misfeasance in public office, the police officer had merely repeated the particulars of claim in his malicious prosecution claim. When dealing with the claim for misfeasance in public office, Master Yoxall gave summary judgment to the defendant, holding that the police officer had no real prospect of establishing bad faith by the Independent Office for Police Conduct and stated:

“Error of judgment, even serious error of judgment, is not sufficient to establish liability.”

[54] In stating this, Master Yoxall was echoing the observation of May LJ in *London Borough of Southwark v. Dennett*:

“Subjective reckless indifference is a possibility but not a necessary inference. There are other possibilities of which the strain of overwork or incompetence are two.”

[55] Likewise, in *Hughes v His Majesty's Revenue & Customs and the Crown Prosecution Service* [2024] EWHC 1765 (KB) the Court of Appeal refused to grant leave to appeal against a decision to strike out a claim for misfeasance because the claimant in that case could not go beyond showing that the prosecution in its various forms had been incompetent. While the negligence and incompetence had in some respects been gross, the claimant nevertheless had no real prospect of establishing bad faith.

[56] A further important issue as regards the proper pleading of claims of misfeasance is whether or not specific individuals must be identified in the

pleadings. As May L.J. said in *London Borough of Southwark v. Dennett* [2007] EWCA Civ 1091, at [21]:

“... In *Society of Lloyds v Henderson* [2007] WL 2817792 , Buxton LJ emphasised that for misfeasance in public office the public officer must act dishonestly or in bad faith in relation to the legality of his actions. The whole thrust of the *Three Rivers* case was that knowledge of, or subjective recklessness as to, the lawfulness of the public officer's acts and the consequences of them is necessary to establish the tort. Mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be established. To that end, they need to be identified.”

[57] In *BCLI v Commissioner of the Police for the Metropolis* [2024] EWHC 3018 KB the court observed that the pleading, as it then currently stood, failed to specify who it was said had acted in bad faith and how. While the claim was against the Commissioner of the Metropolis, the court noted it was not a personal allegation against the Commissioner and that the claimant was obliged to identify the officer (or officers) who had allegedly acted in bad faith and identify any acts of bad faith.

[58] In *Van Buuren v The Chief Constable of Cambridgeshire Constabulary and others* [2025] EWHC 195 (KB) Sweeting J struck out a misfeasance claim where the particulars of claim lacked the necessary specificity, particularly with regard to the powers exercised, the individuals involved, the dates of the alleged misconduct, the evidence of bad faith, and the factual basis for each element of the tort.

[59] However the requirement to identify individuals in pleadings for misfeasance is not entirely agreed to. In *Chagos Islanders v Attorney General and another* [2003] EWHC 222 (QB) the defendants submitted that that pleading should be struck out and that, as the claimants had not identified any individuals who were said to have acted in bad faith, the whole claim under this head should be struck out. The claimants responded that it was unnecessary as a matter of law for them to identify bad faith on the part of a single officer in order for the defendants to be liable. Ouseley J noted Lord Hutton in his speech in *Three Rivers* had said that particulars did not have to be given of the individual officials whose actions brought about the misfeasance alleged, if the allegation was one of corporate misfeasance. Ultimately, in the *Chagos Islanders* case Ouseley J concluded:

“Misfeasance is a tort of personal bad faith; it is a serious allegation. At trial the necessary ingredients will have to be shown. The making of the allegation should not be the vehicle for a general inquiry into wrongdoing. Insofar as Mr Allen suggests, by his reference to preferring the approach in *Three Rivers*, that in corporate misfeasance it is unnecessary to identify individuals, he is wrong. If Lord Hutton

was differing from the other two in the majority as to the basis upon which the pleadings were adequate and suggesting that in corporate misfeasance it was not necessary to show that anyone had the requisite knowledge, I do not think that the authorities cited by him bear out the point. I think that in reality Lord Hutton, like Lords Steyn and Hope, is making a narrower point as to pleading adequacy in the context of the pleadings and documentation in that case.”

and

“Each case has to be decided on its own material. All that can be drawn from it is the pleading point that it is not always necessary for the Particulars of Claim to identify the individuals who it is alleged had the requisite knowledge and who did the acts complained of, provided, and this is important, that the nature of the case which the Defendants have to meet appears adequately for the just, effective and expeditious preparation and disposal of the case, from the pleadings with the documentation.”

Ouseley J then concluded:

“I do not regard there as being an arguable case of misfeasance. If there were, I would stay proceedings until there were a proper pleading of who did what and with what knowledge or recklessness.”

[60] From the case law on this issue, it appears therefore that while, in general, a plaintiff who alleges the tort of misfeasance in public office must identify the individuals about whose conduct he complains, there may be a small number of cases where it is possible to proceed without such identification. However, this does not necessarily make the task of pleading easier for a plaintiff as he must still plead facts which show that a public official exercised a public power in bad faith and that the conduct complained of was *not* mere incompetence or grossly negligent. If he does not know who that official was, the task of pleading what his or her state of mind was may, in fact, be more difficult, if not impossible, as a consequence.

The Previous Judicial Warning of Inadequate Pleadings

[61] This application to strike out her statement of claim does not fall upon the plaintiff out of a clear blue sky. On 28 February 2025 a review of this action was held before Rooney J. During that review the judge raised with counsel what he saw as inadequacies in the plaintiff’s statement of claim. Both Mr McEvoy and Mr Bassett appeared before the court on that occasion. At the application before me, the defendant submitted his solicitor’s note of that interchange. I raised two issues with both counsel as regards that note. Firstly, as to whether I could rely on the solicitor’s

note at all, given that it was a summary for his file and not an accurate transcript of what Rooney J had said, Secondly, as to what weight could be put upon a judge's comments made at a review given that they did not have the status of a considered, written judgment.

[62] It is clear that the remarks made by a judge during a review do not possess comparable weight to remarks written in a published judgment. Nevertheless, just as counsel would take into account the extra-judicial remarks of an experienced member of the judiciary at a public lecture, so too guidance judges give in the course of their judicial functions should not be quickly disregarded or ignored. I cannot, and do not, of course, outsource the task of considering this application to Rooney J's views expressed in the context of a review. I must, and do, consider the application myself on the basis simply of the law and the facts. Nevertheless, the profession will find the judge's comments illuminating as to how misfeasance in public office should be pleaded. I therefore record the comments of Rooney J for that purpose. The digital recording of the review shows that part of what the judge said to Mr Bassett about the statement of claim was as follows:

"When I saw this, this is not what I would consider adequate pleading. It is literally just a narrative. I am dealing now specifically with the particulars of misfeasance in public office. Misfeasance in public office is a very difficult tort to actually succeed in. You will probably appreciate that, to succeed, you have to plead it very, very carefully. Essentially, you're pleading malice or reckless indifference on the part of the police officer. You have to start off with basics which is going to the relevant case law which is *Three Rivers v Bank of England* back in 2003. I'm just looking at one of my previous judgments. You must prove that one of the police officers was exercising public functions. You should have no problem doing that. But then you have to go on to prove that they were abusing their public powers or authority and how you say they did that. Or they were recklessly indifferent as to the limits of their public powers or authority. You haven't done that. And then you have to prove that the police officers acted with either the intention of harming the claimant (that's targeted malice) or with the knowledge of the probability of harming the claimant or with a conscious or reckless indifference as to the probability that their acts or omissions would harm the claimant (that is untargeted malice or what is called the illegality limb.) You've got to do that. I don't see ... you haven't done that."

[63] At the review, and in response to the comments of Rooney J, Mr Bassett submitted that he thought they had certainly an arguable case in this pleading but if the court would prefer "greater refinements", that could be done within seven days.

CONCLUSION

The Pleading of Bad Faith

[64] I deal firstly with what I have described in this judgment as “MIPO 1”. In the application now before the court, counsel attempts to ride both horses of targeted and untargeted malice. The case of targeted malice is pleaded in these terms:

“The failure to pass on the existence, nature, source and/or imminency of the threat to life of the deceased was a deliberate and dishonest use of public power. This was targeted malice by those officers of the Defendant who knew of the threat and consciously elected not to act upon it. The decision of the Defendant, his servants and/or agents was, therefore, specifically intended to injure the deceased as it was known that he would be killed”.

and the case of untargeted malice is pleaded thus:

“. ... the failure to pass on the existence, nature, source and/or imminency of the threat was a reckless misuse of public law powers. In such circumstances, to fail to act was an unlawful omission. Those officers of the Defendant who knew of the threat and elected not to act upon it were subjectively reckless about the consequences of their acts and omissions. The officers acted in a manner which they knew to be contrary to the duties to preserve life imposed on them in the common law and RUC Force Order 12/84.

[65] However there are no facts pleaded in respect of the murder of Mr George which could lead a court to conclude that any flaws identified in the police actions or inactions were caused by bad faith as opposed to negligence or incompetence. There are simply no facts pleaded in respect of the state of mind of the officers concerned (whoever they were). The Particulars of Mifedance state:

“The failure to pass on the existence, nature and/or imminency of the threat to life of the deceased was a deliberate and dishonest use of public power. This was targeted malice by those officers of the Defendant who know of the threat and consciously elected not to act upon it. The decision of the Defendant, his servants and/or agents was, therefore, specifically intended to injure the deceased as it was known that he would be killed.”

That statement must be recognised for what it is. It is a bare assertion. It is an articulation of suspicion and belief. It is not the pleading of a fact. Likewise, when the statement of claim asserts:

Colluding with terrorists by failing to inform the deceased of the credible threat to his life.”

This again is a bare assertion. There are no facts pleaded which show that this was the position.

[66] What the plaintiff has done is to produce a general narrative about what has happened in other cases and then followed that with a conclusion which amounts to a suspicion, belief or bare assertion, and is therefore without any material facts from

which a trial judge could, on the balance of probabilities, conclude that bad faith occurred. Yet counsel argues that such bad faith is an irresistible inference. This is, in my view, a failure to understand the legal concept of inference.

[67] The plaintiff's assertion that the failure to pass on to Mr George that there was a threat against his life was done in bad faith and amounts to misfeasance is undermined by the HET Report into his death, which was somewhat ironically exhibited before the court as part of Mr Bunting's replying affidavit. The report states:

"As outlined earlier in this report, the RUC received intelligence in March 1984 that the INLA intended to kill John. The HET has reviewed this intelligence. It is not detailed and does not reveal who specifically made the threats to John or how, when or where the attack was to take place.

The threat was taken seriously by the RUC and they were fully aware that the INLA had previously murdered its own members and other people from their own community. The case papers show that on receipt of the intelligence details of the threat against John were passed to the police sub-divisional commander for the area where he lived. This was in keeping with the RUC policy at the time. There is no record of what efforts were made to inform John of the threat or whether he was told about it.

Records show that John was wanted for questioning by the RUC in connection with recent offences. This was confirmed by witnesses who said that John had told them he had been on the run for a week."

Firstly, the fact that the case papers show that details of the threat were passed to the police sub-divisional commander for the area where Mr George lived indicates that the inference which the plaintiff wishes a trial judge to draw, namely that the police in bad faith did not inform Mr George of the threat so as to protect an intelligence source, cannot be sustained. Those police officers who controlled the release of intelligence clearly passed that intelligence on to other police officers for the purpose of Mr George being informed of the threat against his life. Secondly, the fact that witnesses say that Mr George had been "on the run" make it possible that the threat was not passed to Mr George because the police could not locate him. Both facts seriously undermine the plaintiff's case in respect of MIPO 1.

[68] I now turn to what I have described as "MIPO 2", namely the investigation into Mr George's murder. I have concluded that there are no facts pleaded by the plaintiff regarding the state of mind of the CID officers who handled the subsequent investigation into the murder of Mr George.

[69] Furthermore, the HET report into the original investigation, offered to the court by Mr Bunting undermines the argument that that was the case:

“The initial response to John’s shooting was prompt, efficient and appropriate. An ambulance crew arrived quickly, treated John and took him to the Royal Victoria Hospital. The first officers attending the scene carried out a thorough examination that resulted in the recovery of a bullet head and a bullet fragment, a cap believed to be worn by one of the terrorists and fingerprints.

The HET often seeks to engage directly with retired officers to discuss the investigations they conducted. This is useful because the HET can talk to them about the main lines of inquiry that the investigation team followed, any difficulties they encountered during the investigation and sometimes fill gaps in information caused by missing original case papers.

In John's case the officer in charge of the investigation was Detective Chief Inspector Pickard. The HET has spoken to Mr Pickard, who retired some time ago. He was eager to help with the review but due to the passage of time he could not recall specific details about the case.

Nineteen arrests were made during the investigation and it is clear that Detective Chief Inspector Pickard used every opportunity to seek information to arrest those responsible for John's murder. Significant efforts were made to identify the origin of the Kangol cap and who may have purchased or worn it, but this proved unsuccessful.”

[70] This material tends to undermine the plaintiff’s allegation of misfeasance in relation to MIPO 2 by making it more difficult for a court to draw an inference of bad faith in respect of any weakness which might be demonstrated in that investigation.

The Identification of Individuals

[71] When it comes to the issue of the identification of individuals in the case before me, Mr Bassett, in his oral submissions, was able to identify by name and rank, the senior investigating officer who was in charge of the investigation of Mr George’s murder. However, neither that officer nor any other named individual was identified in the pleadings in connection with the generalized criticisms that there had been a failure to retain all relevant forensic evidence, follow up on obvious intelligence-led opportunities in investigating the murder, achieve any adequate identification of those who had been involved in the murder, or have any contact with Mr George’s family in relation to the conduct of the investigation. Nor did counsel plead any fact about the state of mind of any CID officer. All that was contained in the statement of claim regarding MIPO 2 were bare assertions of targeted malice and untargeted malice.

The Use of Similar Fact Evidence

[72] Paragraph 9 of the plaintiff’s statement of claim refers to what is described as “the model of policing in Northern Ireland”. It alleges that handlers of informers

were instructed to ignore the most serious breaches of the criminal law in order to obtain intelligence for police. The purpose of this paragraph is clearly to invite the court to admit similar fact evidence that, because such behaviours may have occurred on certain previous occasions, the court should conclude this is what occurred in relation to the murder of Mr George. For the plaintiff to succeed in this argument, she must surmount two hurdles.

[73] Firstly, there is a hurdle as regards the admissibility of similar fact evidence in civil proceedings which has been set by the House of Lords in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534. That decision was recently summarised by Nicklin J in *Baroness Lawrence of Clarendon OBE and others v Associated Newspapers Limited* [2025] EWHC 2573 (KB). The context in the latter case was a claim for misuse of private information which had been gathered by phone hacking that targeted a number of defendants including the Duke of Sussex. Nicklin J summarised *O'Brien* as follows:

“In *O'Brien*, the claimant had brought a claim for misfeasance in public office and malicious prosecution against the Chief Constable of South Wales police. As part of his case, the claimant alleged that named police officers had been guilty of similar misconduct in other cases. The House of Lords held that the test of admissibility of similar fact evidence in a civil action was of relevance only, namely that the material to be adduced was potentially probative of an issue in the action. Where that test was met, the Judge with management of the litigation would then consider whether to admit the evidence, having regard to the overriding objective of achieving a just result through a trial process that was fair to all parties. The Court would assess the potential significance of the evidence in the context of the case as a whole, weighing its potential probative value against its capacity both to cause unfair prejudice and to increase disproportionately the length and complexity of the trial. The judge would not admit the evidence unless satisfied that its probative cogency justified any risk of prejudice and, where it concerned collateral matters, that it would not distract attention from the central issues.”

In *O'Brien* Lord Carswell had quoted (at [72]) with approval what Lord Denning had said about the admissibility of similar fact evidence in *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119,127:

“The admissibility of evidence as to ‘similar facts’ has been much considered in the criminal law... The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar

facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it.”

Nicklin J went on to apply the principles:

“12. *O'Brien* decided that there was no special rule for admissibility of similar fact evidence in civil claims. To be admissible, the evidence had simply to be logically probative of an issue to be determined in the proceedings. So, in the police cases, evidence that a police officer had fabricated evidence on another occasion was admissible to seek to demonstrate a propensity on his/her part to do so. In turn demonstration of such a propensity was capable of providing evidential support that s/he had done so in the immediate case. *O'Brien* is not authority for the proposition that proving propensity for misconduct against employee A is logically probative of whether employee B is guilty of such misconduct. Mr Sherborne has not been able to identify an authority for such a proposition.

13. Applying the two-stage test from *O'Brien*, I have decided that proving that Journalist A has a propensity to use UIG [Unlawful Information Gathering] cannot be probative of whether Journalist B had such a propensity. In other words, such a case falls at the first hurdle to be admitted as similar fact or propensity evidence; it is not logically probative. It is not necessary to consider whether the alleged propensity evidence should be excluded on case management grounds. In the example I have given, that stage is not reached.”

[74] I do not consider that it is appropriate for this court to reach a decision on whether the plaintiff’s assertion about “the model of policing in Northern Ireland” can amount to similar fact evidence. That would be an evidential matter for a trial judge to decide at a trial. I merely recognise that any argument by the plaintiff that there is probative value in this action which flows from the actions by other police officers in other cases is an immensely difficult argument to make.

[75] Secondly, even if the plaintiff succeeds in surmounting that first hurdle and persuading a court that the evidence of similar facts is admissible, there is then another hurdle, namely persuading the court that the facts which have been proved through the similar fact evidence are such that court may draw a logical inference that something similar occurred in this case. In my view, however, what the plaintiff would be inviting the court to do is not to draw a logical inference, but rather to speculate. Such speculation is an impermissible approach to judicial fact-finding. A conjecture may be plausible but of no legal value, because it is essentially a mere guess. On the other hand an inference is a deduction from the evidence and, if it is a reasonable deduction, it has the validity of legal proof. The principles underlying the proper drawing of inferences are widely understood throughout the Common Law world. In *Parlee v. McFarlane* [1999] 9446 (NB C.A.) the Court of Appeal from New

Brunswick underscored this fundamental difference, stating that conjecture was not a reliable fact-finding tool for the simple reason that it did not rest upon a compelling evidentiary foundation and as such, it had no place in judicial decision-making. In the High Court of Australia, Kitto J observed in *Jones v Dunkel* (1958-9) 101 CLR 298 that a judge does not pass from the realm of conjecture into the realm of inference until some fact is found which provides a reason for thinking it likely that a specific event happened or a specific state of affairs existed. Evidence of police behaviour in other situations fails to have evidential value in respect of this case.

[76] The argument which counsel for the plaintiff invites this court to accept, namely that “an irresistible inference that the police, in bad faith, elected to protect an intelligence source” should be drawn because of police misconduct by other officers in other cases, cannot therefore succeed, as I have previously indicated, because of the failure to understand the difference between inference and conjecture.

Striking Out the Action

[77] Misfeasance claims must be precisely pleaded. It has been repeatedly emphasised by the courts that the facts relied upon to support misfeasance claims must be fully and clearly specified which support the existence of the ‘bad faith’ alleged to accompany the exercise of the public power. Misfeasance claims are often articulated in terms that depend upon drawing inferences as to the public official’s state of mind. In this regard, it must be remembered that whether or not a particular inference is open is a question of law, not a question of fact. Allegations of misfeasance should be analysed in light of this proposition. If the facts alleged in support of a pleading of deliberate or reckless wrongdoing are equally consistent with negligence, oversight or innocent error then, as a matter of law, the allegation of misfeasance is unsustainable (*Three Rivers* [184]-[189]).

[78] It is clear that the vast majority of claims for misfeasance in public office are struck out in England and Wales at an interlocutory stage for failure of counsel to properly plead the case. This also frequently occurs in Northern Ireland. To use a nautical metaphor, these ships usually sink after running around on the rocks of the requirement to plead facts which support an allegation of bad faith. This difficulty in pleading bad faith led Master Davidson to speak in *Young v Warwickshire Police & Another* of the “heavy burden” on the plaintiff who alleges misfeasance.

[79] The fact that a pleading is defective does not of course inevitably lead to an outcome of the pleading being struck out. As Tugendhat J observed in *In Soo Kim Park & Others* [2011] EWHC 1781 (QB) at [40]:

“However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right....”

Given that in this action discovery is now complete and the plaintiff has now made four attempts to produce a satisfactory pleading, the most recent of which has

followed after a tutorial on pleading by Rooney J, there is no prospect of the pleading defects being cured and so it is appropriate that this action must now be struck out. To do otherwise would be to waste the valuable resource of court time which has to be expended on actions which have some genuine likelihood of success.

[80] Sir Thomas Bingham stated in the case of *E (a minor) v Dorset CC* [1995] 2 AC 633 at 693 - 694 that judges are uneasy about deciding legal principles when all the facts are not known, but that:

“... applications of this kind are fought on ground of a plaintiff’s choosing since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases.”

[81] I therefore strike out the plaintiff’s action under Order 18 Rule 19(1)(a) on the basis that there is no reasonable cause of action. Although the plaintiff has alleged bad faith, an essential element of the tort of misfeasance in public office, her pleading contains no facts on which such an assertion can be based.

[82] I would also have determined that the court should strike out the plaintiff’s statement of claim under Order 18 Rule 19(1)(b) on the basis that it is frivolous or vexatious (the somewhat old fashioned wording used in the Rules to describe an action which is “obviously unsustainable”).

[83] Mr Bassett specifically informed the court that the plaintiff is not legally aided but is self-funding this action. The implication in what he submitted was that as public money was not being spent bringing this action, this was a further reason that it should be allowed to proceed. I take a different view. It would be cruel to the plaintiff and her family, both emotionally and financially, to give them the false hope that there is any possibility of this action being successful and allow this case to go forward.

Costs

[84] It is clear that legal practitioners have a duty to represent their client fearlessly and to the best of their ability and to plead the case to the client’s best advantage. However, counsel also owe an overriding duty to the court (*Rondel v Worsley* [1967] UKHL 5 per Lord Reid). In recent years there have been a number of decisions explaining what the pleading requirements are in order for a litigant to be successful in an action for misfeasance in public office. Frequently, if not regularly, such pleadings have been struck out, usually for the absence of material facts in relation to bad faith. It is disappointing that practitioners seem to have ignored those decisions and continue to press on with the inclusion of what are, in reality, hopeless allegations of misfeasance in public office. Where counsel have adopted a “kitchen sink” approach to pleadings and included the tort of misfeasance in public office in circumstances where they have no, or manifestly insufficient, material facts pleaded to support such an allegation, they should urgently review those pleadings with a view to amending them. Henceforth, where I consider that a strike out application should be granted and that misfeasance in public office has unreasonably been

included in a plaintiff's Statement of Claim in a manner which contravenes proper professional standards, I will consider whether it is appropriate to make a Wasted Costs Order instead of requiring the blameless client or the legal aid fund to pay the costs.

[85] In this case I shall however make the usual order that costs follow the event and that the plaintiff shall therefore pay the costs of the defendant.